PROJECT NO. 16251

INVESTIGATION OF SOUTHWESTERN BELL TELEPHONE COMPANY'S ENTRY INTO THE TEXAS INTERLATA TELECOMMUNICATIONS MARKET	§ § § §	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

COMMENTS OF THE CLEC COALITION TO SOUTHWESTERN BELL TELEPHONE COMPANY'S MEMORANDUM OF UNDERSTANDING

TO THE HONORABLE COMMISSION:

The CLEC Coalition[1] understands and appreciates the tremendous amount of time and resources Chairman Wood, the PUC staff and Southwestern Bell Telephone Company ("SWBT") have devoted to resolving the issues that remained outstanding at the conclusion of the collaborative process in early February. The Commission's strong commitment to ensuring the viability of local competition has been evident to all throughout this arduous proceeding. Indeed, the Commission's recommendations on several significant issues, e.g, cageless collocation and extended link, was affirmed by FCC in orders that were released subsequent to the end of the collaborative process. While the Coalition shares the Commission's desire to complete this proceeding , it also understands that the Memorandum of Understanding (MOU) is, to a large extent, the parties' last opportunity to ensure the local market is irreversibly open to competitors. The Coalition has endeavored to limit its comments to #1) the matters that are critical to their businesses and 2) to provisions in the MOU that are clearly inconsistent with the FCC's orders on particular issues. Moreover, because of the extremely limited time which the parties have had to review and digest the MOU, in some instances our "comments" are more in the form of questions to which the Coalition members need answers before they can determine the effect of a particular provision in the MOU.

[1] The members of the CLEC Coalition participating in these comments are: Time Warner Telecom, Intermedia Communications, Inc., Westel, Inc., e.spire Communications, Inc., ICG Communications, Inc., NEXTLINK Texas, Inc. and Covad Communications, Inc.

The Coalition members recognize that the MOU reflects significant progress on most of the outstanding issues and they hope that the Commission will understand that the following comments are not intended as criticisms but pleas for improvements to the MOU they believe are essential to the creation of an irreversibly open local market in Texas. The Coalition, as much as the Commission, wants to make sure that SWBT's promises are not broken or explained away after it is too late to "fix" a problem. None of us can afford to find out down the road that SWBT's limited, qualified, or unclear "yes" is really a "no" on any of the material issues. This concern is not idle paranoia; it is deeply rooted in the experiences each and every one of the Coalition members have had with SWBT. Moreover, if SWBT has its way on the legislative front, the Commission's ability to protect competition in the future will be extremely limited, if not nonexistent. [2] This is why it is so essential that Texas not be rushed into approving an MOU that is incomplete, unclear or contrary to law. We have to get it right. Now.

A. Checklist Items - Attachment A

The Coalition's comments on the MOU focus primarily on Attachment B because it contains the issues that were not resolved during the Collaborative Process are addressed. However, the Coalition has a few brief comments on Attachment A.

First, the summary of Checklist Item 4 states that 4 wire HDSL unbundled loops are available subject to the subscriber having "means to provide 911 calls from the same location." This should be clarified to apply only to instances where the HDSL loop is being used to provide voice, not data, service to the customer. As recognized by the Commission in its current rulemaking regarding "Data CLECs," certain requirements, e.g., 911 obligations, applicable to CLECs providing voice services are simply inapplicable when a CLEC is providing only a data service to a customer. In addition, SWBT states, "Commission Staff clarified that wireless technologies shall not be considered "adequate means to provide 911 calls" unless they are ALI

[2] Witness, for example, the most current version of the SWBT deregulation bill, CSSB 560, which completely eliminates Subtitle C (including competitive safeguards) from PURA on September 1, 2003 unless expressly continued.

capable." Att. A, p.7. Where did Staff make this clarification? Also, what is the relationship between this statement and future or proposed rules? See proposed rule on 911 and advanced technologies.

Second, the summary of Checklist Item 7 should be clarify whether the 911 listing information ordering processes have been implemented in SWBT states other than Texas.

Third, the summary of Checklist Item 8 should confirm that SWBT is "on schedule" with respect to the May 1, 1999 implementation date for the ALPSS/LIRA database.

Finally, the summary of Checklist Item 13 should describe the "interim solution" relating to reciprocal compensation that SWBT has agreed to with some other CLECs. In addition, SWBT agrees to provide CLECs the option to enter into interconnection agreements similar to the arrangements SWBT has with other ILECs for traffic within mandatory EAS, including ELCS.

Section 272 Commitments

2(a): SWBT commits to posting the full text of all agreements between SWBT and SBLD on its Internet website, including rates, terms, and conditions of those agreements...

Are these agreements available for MFN-like rights? What about collocation arrangements? What type of affiliate disclosure rules will be followed to assure the community that SWBT's affiliates are not receiving preferential treatment with respect to collocation? The details of these arrangements, including, but not limited to the location, the cost, and the associated timing should be made public.

2(b) SWBT agrees to post for each agreement, the states where SBLD's operations are supported by the agreement.

SWBT requires that regional carriers obtain state-specific agreements. SBLD should either be required to obtain and follow state-specific agreements, or CLECs should be permitted to utilize a state agreement of its choice in other jurisdictions, subject to approval of the regulatory commission of those states. Treating SWBT's affiliates differently is not justified or permitted. Or is it?

2(c) SWBT agrees to maintain for each agreement, information indicating the specific FCC pricing methodology used by SWBT to determine the rates for the agreement.

It is unclear what this commitment means. Is SWBT agreeing to provide the underlying cost study used by SWBT to determine the rates for the affiliate agreement or is it merely proposing to identify something less?

Affiliate in same service area

If SWBT is permitted, by either legislative fiat or Commission decision, to have an affiliate that holds a Certificate of Operating Authority (COA) in its own serving area, the Commission should condition such certification on SWBT's agreement that Section 251(h) of the FTA applies to the COA holder affiliate of SWBT for the life of the PIA. SWBT should not be permitted to escape its obligations under the MOU and the implementing documents by the transfer of any services, facilities or obligations to an unregulated affiliate.

B. Attachment B

I. <u>Collocation</u>

On March 31, 1999, the FCC released Order 99-48 in the 706 proceeding (Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147 ["FCC Order"]) regarding collocation and loop issues. The following comments cite the sections of the FCC Order that are contrary to the provisions of the MOU. Also, the Coalition seeks clarification of <u>when</u> the amended physical collocation tariff will be filed.

A.2. Insert the phrase "Unless extended by the Commission for good cause" so that the Commission has some time flexibility in case the tariff filing requires additional review before approval.

A.4. SWBT should explicitly add the following language from paragraph 42 of the FCC's order: SWBT will allow competitors to collocate in any unused space in SWBT "eligible structures" without requiring the construction of a room, cage or similar structure subject to technical feasibility and permissible security parameters (FCC order ¶¶ 46 – 49).

A.7. In this and other provisions in the Collocation section, SWBT uses the term "eligible structure" in relation to collocation. As defined in SWBT's physical collocation tariff, this term is inclusive of the FCC's definition of "premises." However, SWBT witness Dan Poole recently testified in the Waller Creek arbitration proceeding that "The term 'eligible structure' does not include SWBT central office locations, but rather is referring to CEVs, huts, and cabinets." (Direct testimony, filed March 22, 1999 in Dockets 17922 and 20268). The Commission should confirm that, as referred to in the MOU and SWBT physical collocation tariff, that the term "eligible structure" includes all SWBT central office locations and other types of SWBT premises in Texas.

A.10. Since sub-leasing is permitted and there could be arrangements made directly between the two CLECs sharing space where one CLEC would want to billed for the whole cage, there should be flexibility for the charges to either be prorated or assessed to the carrier with the collocation arrangement.

B.1. This paragraph fails to address SWBT's interval and price agreements regarding cageless collocation. In the arbitration between Covad and SWBT, SWBT has agreed to supply cageless collocation at a flat rate, subject to true-up with any Commission determinations that implement FCC requirements. Thus, cageless collocation is not subject to a price quote interval because the flat-rate pricing eliminates the need for a price quote. At a minimum, all time intervals for cageless should be explicit, not just "shorter than caged." The Coalition suggests that a percentage be used, e.g. "50% shorter that caged."

This paragraph also fails to address the construction interval for cageless collocation to which SWBT agreed in the Covad Arbitration. In that proceeding, SWBT agreed to make cageless collocation space available where space and power are available within sixty (60) calendar days of receiving a CLEC's 50% deposit. Accordingly, SWBT's "construction turnaround time" for cageless collocation space should be reduced from ninety (90) days to sixty (60) calendar days.

Finally, the term "material revision" to an application should <u>exclude</u> expressly requests to convert pending physical collocation applications to "cageless" collocation applications, provided that SWBT has not begun physical construction pursuant to the physical collocation application identified for conversion.

B.2. The types of augments that can be achieved within each time interval should be specified, e.g, running a cable would only be 15 days. In addition, SWBT should provide augments required to collocate DSLAMS, ATMs and other equipment allowed by the FCC Order within 15- 30 calendar days of receiving a CLEC's deposit.

B.3. Revisions should include that CLEC is able to tour the "entire premises." Also, SWBT should be required to specify the revisions and clarifications it intends to make to the Third Party Review Process, including without limitation procedures for appeal of a Third Party Evaluation, timeframes for the Third Part Review Process, and methods for the selection of a Third-Party Engineer. The FCC Order provides specific procedures for resolving disputes regarding collocation, including application to the Commission. Any revisions to the tariff should implement these procedures.

B.4. SWBT should not be permitted to limit the number of visits a CLEC may make during the construction of a caged collocation space and should not be required to provide advance notice of any visits to SWBT. CLEC visits during cage construction are necessary for a planning purposes. Moreover, CLEC's should be entitled to inspect the construction site as often as necessary when SWBT a delays the construction of a caged collocation space. A limitation on CLEC visits would allow SWBT to abuse construction intervals with impunity.

B.5. Should be modified at the end of first sentence to say: "as long as the charges assessed are for a truly unique request." For example, if a request is made and existing power is at capacity and all new power requirements must be placed that will ultimately be available for other collocators, then that should be prorated, as with an additional POTS Bay. Second, SWBT uses several examples of the types of ancillary costs that could be directly attributable to a single CLEC. The Coalition doesn't understand the reference to remote switch module related options and don't think we can agree with this example because it should be treated like any other piece of equipment.

B.7. A time period within which SWBT will remove obsolete equipment needs to be provided. The Coalition suggests that "within 60 days" be inserted after "from the CO" in the first sentence. SWBT should not be permitted to implement space reservation procedures for itself that are more favorable than those applicable to CLECs. 47 C.F.R. § 51.323(f)(4) ("[A]n incumbent LEC may retain a limited amount of floor space for its own specific future uses, provided, however, that the incumbent LEC may not reserve space for future use on terms more favorable than those that apply to other telecommunications carriers seeking to reserve collocation space for their own future needs.").

B.8. CLECs should not have to notify SWBT if equipment is added as long as SWBT doesn't have to do anything (e.g., no additional power requirements) and it is equipment that has already been put into collocates and NEBS compliance is not an issue. Moreover, SWBT's proposal to require CLECs to certify compliance with NEBS Level 1 safety standards violates the FCC Order. CLECs should not be required to certify compliance with NEBS safety standards for equipment unless SWBT provides the same certification for its equipment at the same premises. FCC Order ¶ 36 ("[T]he incumbent may not impose safety requirements that are more stringent than the safety requirements it imposes on its own equipment that it locates in its premises."). Likewise, a CLEC should not be responsible for the removal of equipment that does not satisfy NEBS Level 1 safety standards unless SWBT provides "within five business days a list of all equipment that [SWBT] locates within the premises in question, together with an affidavit attesting that all of that equipment meets or exceeds the safety standard that [SWBT] contends the competitor's equipment fails to meet." FCC Order ¶ 36.

C.3. If the Commission or a "Third Party" determines that collocation space is unavailable in a central office, SWBT seeks to limit further inspections of that central office to one inspection every six months. This proposal directly violates the FCC Order, which states that an incumbent LEC must "permit representatives of a requesting telecommunications carrier that has been denied collocation due to space constraints to tour the entire premises in question . . . within ten days of the denial of space." FCC Order ¶ 57. SWBT also proposes to post any changes in space availability on the Internet and provide notice to CLECs via an Accessible Letter within 30 days would also appear to violate the FCC Order unless it is clarified that the Internet posting will occur within ten (10) calendar days, as required by the FCC's order ¶ 58. Finally, if SWBT and a CLEC that has been denied collocation space disagree, after an inspection according to the FCC Order, about the availability of collocation space, the dispute should be resolved by the Commission, not a Third Party Review Process. FCC Order ¶ 57.

C.5. A time period within which SWBT will remove obsolete equipment needs to be provided. The Coalition suggests that "within 60 days" be inserted after "eligible structure."

C.6. This paragraph proposes procedures for supplying information to verify space exhaustion claimed by SWBT. SWBT's proposal, however, limits the application of those procedures to the "initial" denial of space by SWBT. The FCC Order, however, requires SWBT to submit such information upon *every* denial of space. FCC Order ¶ 57. Moreover, the information submitted by SWBT should not be filed under seal, but should available for public verification.

D.3. SWBT seeks to limit cageless collocation to any unused space "not reserved for future growth." This provision is ambiguous. Cageless collocation must be allowed in "any unused space in the incumbent LEC's premises." FCC Order ¶ 42. SWBT should not be permitted to implement space reservation procedures for itself that are more favorable than those applicable to CLECs. 47 C.F.R. § 51.323(f)(4) ("[A]n incumbent LEC may retain a limited amount of floor space for its own specific future uses, provided, however, that the incumbent LEC may not reserve space for future use on terms more favorable than those that apply to other telecommunications carriers seeking to reserve collocation space for their own future needs."). The Coalition also seeks confirmation that SWBT will permit immediate conversion of virtual collocation arrangements to cageless physical upon transfer of title since access to our equipment cannot be denied under the FCC's Order (¶ 42).

In paragraph D.3., SWBT also proposes to erect a wall to separate its equipment from the equipment of collocators. Although the use of a cage may be appropriate, SWBT should not be permitted to enclose its equipment space with a wall separating it from cageless collocation space. Such a practice will reduce the amount of available collocation space. FCC Order ¶ 42 ("[T]he incumbent LEC may not, however, require competitors to use separate rooms or floors, which only serves to increase the cost of collocation and decrease the amount of available collocation space."). Moreover, SWBT's efforts to impose such costs for the construction of its own enclosures on CLECs is improper under the FCC Order. *See* FCC Order ¶ 42.

D.4. SWBT's proposed adjacent collocation commitments in this paragraph omit important provisions from the FCC Order. To comply with the FCC Order, the final sentence of this paragraph should state: SWBT will provide power and physical collocation services *and facilities* to such adjacent structures, subject to the same *nondiscrimination* requirements as traditional collocation arrangements. FCC Order ¶ 44. The Commission should also confirm that no restrictions exist with respect to the *types* of facilities a CLEC decides to use for an adjacent collocation.

D.5. SWBT's proposed commitments improperly shift the burden of proof established by the FCC Order regarding technical feasibility of a collocation arrangements. A CLEC should not be required to prove that a collocation arrangement by another incumbent LEC is technically feasible. Instead, "the deployment by any incumbent LEC of a collocation arrangement gives rise to a rebuttable presumption in favor of a competitive LEC seeking collocation in any incumbent LEC premises that such an arrangement is technically feasible." FCC Order ¶ 45. "The incumbent LEC refusing to provide such a collocation arrangement, or an equally cost-effective arrangement, may *only* do so *if it rebuts the presumption before the state commission* that the particular premises in question cannot support the arrangement because of either technical reasons or lack of space." FCC Order ¶ 45 (emphasis added).

E.2. Under the FCC Order, SWBT may not require background checks of CLEC personnel unless the same background checks are required of SWBT employees or authorized contractors. FCC Order ¶ 47. The MOU should state, if in fact this is true, that the requirements for CLECs are the same as those SWBT requires of its employees and contractors.

E.3. SWBT seeks to impose disciplinary procedures *requiring* the termination of CLEC personnel "for certain specified actions that damage or place the network or equipment of SWBT or other CLECs in jeopardy." Under the FCC Order, SWBT may not impose security measures on CLEC personnel that it does not impose upon its own personnel. FCC Order ¶ 47. As shown by SWBT's answers to Request for Information Nos. 2-12 and 2-14 in the pending Covad/ACI arbitration (attached hereto as Exhibit 3), SWBT does not require dismissal of its own employees for "Certain specified actions," but instead handles disciplinary procedures on " a case by case basis." (RFI No. 2-12.) Similarly, SWBT does not require termination of contractors for "certain specified actions," but instead seeks termination only in situations in which "damage to SWBT equipment is not remediated." (RFI No. 2-14.)

E.4. This proposal violates the FCC Order, which states that incumbent LECs may not impose discriminatory security requirements. FCC Order ¶ 47. CLECs should not be required to provide indemnification and insurance to cover actions of their technicians that may harm SWBT facilities unless SWBT provides identical indemnification and insurance to cover acts of SWBT employees that may harm CLECs' facilities.

E.5. SWBT seeks to impose several duplicative security measures. Under the FCC Order, SWBT may impose reasonable, but not duplicative security measures. See FCC Order ¶ ("We permit incumbent LECs to install, for example, security cameras *or* other monitoring systems, *or* to require competitive LEC personnel to use badges with computerized tracking systems.") (emphasis added). In any event, SWBT may not impose any security measures that are more stringent that those imposed upon their own employees or on authorized contractors. FCC Order ¶ 47.

E.6. This paragraph seeks to restrict CLECs access to collocation equipment by requiring a CLEC to provide notice of its visit to its collocation space. CLECs should not be required to provide SWBT with notice of their intended access to collocated equipment. FCC Order ¶ 49 ("[I]ncumbent LECs must allow collocating parties to access their equipment 24 hours a day, seven days a week, without requiring either a security escort of any kind or delaying a competitor's employees' entry into the incumbent LEC's premises . . . ."). SWBT should provide CLECs with reasonable access to *all* basic facilities while at the incumbent LEC's premises, not only restroom facilities and parking. FCC Order ¶ 49.

II. <u>Provision of Unbundled Network Elements</u>

C. (2). If the FCC or a court modifies the TELRIC pricing methodology and if SWBT's subsequent renegotiation of applicable prices for unbundled network elements leads to an arbitration, will SWBT apply the arbitrated rates to any CLEC who has an interconnection agreement with SWBT?

E. This paragraph provides that, if new UNEs are added by the FCC or the State Commission, a CLEC has to add them via a negotiated or arbitrated appendix. CLECs should be able to just incorporate new UNEs into their agreements rather than having to negotiate or arbitrate with SWBT to do so.

______G. Enhanced Extended Link

______G.1. CLECs wishing to utilize a 4 wire digital loop EEL are restricted to utilizing the EEL for circuit switched traffic only. This restriction will render the EEL useless for CLECs that provide data communications, such as frame relay, like Intermedia and e.spire and delay entry of facilities-based carriers in Texas. There has been an arbitrary and illegal distinction drawn between use of the UNEs combined to make the EEL that are used with packet switching and the EEL when used with circuit switching. The Coalition strongly disagrees with the proposal for the following reasons.

There is no legal or policy basis to justify such a distinction under the Act or under the FCC's interpretation of the Act in its Advanced Services orders, specifically its order on the Section 706 Petitions last year. To the contrary, the FCC's orders and the legislative history of the Act itself support a finding that the Act and its requirements are technology neutral,which is completely at odds with the restrictions placed on EEL. The FCC has also held the following: 1) The only limitation on UNE use is restricted to unbundled switching; 2) Interconnection is available to CLECs for the provision of both exchange and exchange access (local and/or long distance services). See attached description of EEL Restrictions and FCC Rules (Exhibit 1). Furthermore, the Texas PUC's own ruling in the Waller Creek Petition belies the placement of UNE use restrictions.

CLECs in many cases provide integrated products provisioned over a 4 wire digital loop. These products carry local and long distance voice and data traffic (exchange and exchange access) over one facility (DS1). Because this traffic terminates in both a circuit (voice) and a packet (data) switch, EEL would not be made available to CLECs to serve these applications since part to the traffic is delivered to a packet switch. Texas customers would therefore be denied access to innovative bundled service offerings at lower rates.

SWBT is in fact using arrangements analogous to EEL today to serve its data customers today. In most cases, incumbent local exchange carriers (ILECs) have only one packet switch in a LATA and will aggregate traffic at that point. This SWBT architecture is exactly what integrated communications providers ("ICPs") like Intermedia and e.spire are seeking from ILECs such as SWBT. Of further concern is SWBT's recent roll-out of ADSL services. Restricting EEL in the provision of voice over data applications will establish SWBT as the monopoly provider of integrated voice and data services. Thus, this is a parity issue. See attached drawing illustrating the RBOC use of EEL (Exhibit 2).

CLECs are attempting to utilize the most time and cost efficient means by which to serve their customer base. To that end, EELs provide the most efficient means to serve our customers, evidenced by the fact that SWBT uses these exact circuits today while denying CLECs access to the same network configuration. Finally, arbitrary restrictions on use plainly are inconsistent with the findings of the FCC and with previous orders of this Commission.

In light of the FCC's finding that the requirements of the Act apply to advanced services and is technology neutral, the Coalition is at a loss to understand why the Commission would approve this limitation on 4 wire digital loops that terminate either in total or in part to packet switches.

G.2. The Commission should clarify that the EEL should be treated as one circuit for purposes of ordering, provisioning fault isolation and repair. This closely parallels how SWBT itself repairs, maintains, orders and provisions the EEL for itself.

G.3. Under Southwestern Bell's (SWBT) proposal, CLECs wishing to utilize 4 wire digital loops and interoffice transport that ultimately are delivered to a packet switch would be required to perform their own combinations via collocation type arrangements, an unwieldy and inefficient alternative that has always been supported by SWBT. This alternative proposal not only discriminates against CLECs who are forced to perform their own combinations and those where SWBT would perform combinations, CLECs who have to perform their own combinations would incur greater expense to support the services offered to customers.

Although traditional collocation arrangements are not required, personnel would have to be resident at each and every central office location to perform the cross connects and maintenance of the combined facilities, a requirement not imposed on the CLECs for whom combos would be performed by SWBT. Accordingly, many of the efficiencies CLECs had hoped to gain will be lost for those who have to perform their own combinations. Thus, many markets that would have been served by facilities-based CLECs operating as Integrated Communications Providers like Intermedia and e.spire will not now be served because the expense cannot be justified. Thus, Texas consumers will not have competitive choices that they could have had, such as integrated data and voice products.

EEL restrictions will force CLECs to continue to use SWBT's special access, obviously a result SWBT intends. SWBT wants to perpetuate these arbitrary and illegal limitations to protect the revenues associated with special access. In the end and either way, the end user customer must pay higher rates because of the arbitrarily increased costs imposed on the CLECs who must perform their own combinations to provide their telecommunications services.

The Coalition is concerned that the PUC appears -- intentionally or unintentionally -- to be insulating SWBT's special access revenues from competition. Neither the Act nor the FCC's orders require that an incumbent be "made whole". In fact, both the Act and the FCC's implementing regulations require state commissions to impose cost-based rates when incumbent LECs provide unbundled elements to CLECs. EEL restrictions, by mandating continued use by CLECs of market-based -- not cost-based -- special access to provide customers with innovative products, are the antithesis of a competitive market, market entry by new entrants and resulting revenue shifts to new entrants. CLECs have no such opportunity to protect their special access revenues. EEL restrictions have the consequence of increasing dependence on special access when the Act mandates a wholesale shift to unbundling and interconnection. With regard to universal service, there is no issue here since special access revenues do not provide contribution to universal service support.

Even if the Commission insists that in certain instances the CLEC must perform their own combinations as required by the MOU, it should be made clear that in that instance the circuit will be treated as one circuit for purposes of ordering, provisioning, trouble isolation and repair.

The Coalition is further concerned that such arbitrary and illegal restrictions like the EEL restrictions contained in the MOU will have the effect of requiring FCC rejection of a SWBT-Texas 271 petition. As the FCC repeatedly has found in its evaluation and subsequent rejection of 271 Petitions by Ameritech, SWBT and BellSouth, limitations on the ability of CLECs to access checklist items will doom prayers for interLATA relief. In this case, the EEL restrictions directly contradict established FCC rules applicable to advanced communications services. Moreover, these restrictions as a practical matter, deny CLEC nondiscriminatory access to unbundled local loops and unbundled transport as required under Sections 251, 252 and 271 of the Act. The FCC would be forced to contradict significant established precedent in order to uphold such restrictions, an avenue they are unlikely to elect.

G.3. The Coalition believes it is inappropriate to impose a penalty on CLECs who submit a forecast in good faith but find that it subsequently was inaccurate. The failure to get one or two large customers could cause a CLEC's forecast to be off by 50%. In addition, how are the "reasonable costs" to be determined?

H. This section says that SWBT waives its rights with regard to combination of network elements already assembled. What rights are they waiving regarding UNEs that are already in combination since the Supreme Court ruled on this? Is this provision supposed to refer to combination of elements that are <u>not</u> already assembled?

III. <u>Appeals</u>

The Coalition believes that the Commission should require that, as part of the MOU, that SWBT agrees to not seek refunds from CLECs to whom it has paid reciprocal compensation. The agreements under which such compensation was paid were negotiated in good faith and approved by the Commission. The Commission also expressly determined in the Time Warner case that the service provided to ISPs was local and subject to such compensation. Morever, the FCC's order on the treatment of ISP traffic for purposes of reciprocal compensation (FCC Order No. 99-30, ¶¶ 21, 24) expressly acknowledged the validity of prior and in fact future state commission rulings that have found and may find that ISP traffic should be treated as local traffic for purposes of reciprocal compensation. The FCC's order is *prospective* in nature and for the life of the interconnection agreements, as interpreted by state commissions, should be upheld. SWBT should be willing to drop its appeals/refund pursuits concerning reciprocal compensation.

Additional discussion of appeals is contained in the Performance Measurements and Additional Agreement Terms sections below.

IV. Reciprocal Compensation

In the event that the FCC and/or the Texas PUC determine a cost structure for ISP traffic, will SWBT commit to incorporating that cost structure into the Proposed Interconnection Agreement without negotiation and arbitration with each CLEC who has the PIA?

V. xDSL and Advanced Services

We are very concerned about the commitments SWBT is making with respect to unbundled DSL loops. Currently, the Covad and ACI arbitration proceedings–Dockets No. 20226 and 20272–cover these very issues. Apparently, SWBT "agrees to follow Docket Nos. 20226 and 20272 relating to the use of xDSL service [subject to its right to appeal]." However, SWBT has announced a number of anticompetitive policies in Section V of Attachment B that appear to preempt the Covad/ACI arbitrations. The outcome of the Covad/ACI arbitrations should govern; the policies SWBT now attempts to impose should not be allowed to stand. Out an abundance of caution, the problems with SWBT policies are addressed here.

First, section V(A)(2) wrongly places the burden of proof on CLECs to prove a negative– that DSL services deployed in other states did not degrade the performance of other services. SWBT's "commitment" improperly attempts to shift the burden of proof to the CLECs. The FCC explicitly determined in paragraph 68 of its March 18, 1999 First Order and Report that the burden rests with SWBT to "demonstrate[] to the state that deployment of the particular technology within the LEC Network will significantly degrade [service] . . . ." If SWBT desires to keep Texas consumers from receiving the same DSL services that citizens from other states enjoy, SWBT bears the burden of proof.

Second, SWBT discourages the deployment of any new DSL services by requiring an overly broad indemnification obligation that applies to any new services that "significantly degrade" other services. See Section V(C). SWBT has defined the term "significantly degrade" in such unrealistic terms that even current services would fail this test. All broadband services, including T1, ISDN, standard DSL services and non-standard DSL services, have the potential to "significantly degrade" other broadband services under SWBT's definition. Thus, a new service that causes no more interference than existing services will be uniquely burdened by the indemnification requirements. The FCC already provides an adequate remedy for service degradation. Paragraph 75 of the March 19, 1999 First Order requires carriers to take corrective action whenever the network is harmed. No indemnification should be required. However, if indemnification is required, it should be bilateral and apply to "all" services that SWBT offers that "significantly degrade" the network, not just any new DSL services.

Third, the last paragraph of Section V(C) improperly attempts to reject portions of the FCC recent order. A technology has either been "successfully deployed" or it has not. SWBT cannot prevent a CLEC from informing others about a technology's successful deployment. This proposal violates both the letter and the spirit of the FCC's Order.

Fourth, the CLEC Coalition urges the Commission to be particularly cautious in evaluating the impact of SWBT's requirements in Section V(F) and (G). While the language appears harmless, SWBT has been attempting to unilaterally restrict its competitors' provision of DSL services by imposing spectrum management programs on the CLECs offering DSL services. Under its spectrum management plan, SWBT has indicated that it could deny DSL loops to CLECs based on so-called "spectrum exhaust." The prospect of SWBT denying loops has been particularly troubling because SWBT has refused to provide the CLECs with any details about this plan or to explain when "spectrum exhaust" is actually reached. In fact, SWBT failed to produce key documents concerning its spectrum management plan (and its separate binder group management/selective feeder separation plan) in the Covad/ACI arbitrations, despite the CLECs' repeated and specific requests for this information both in this proceeding and in the arbitrations. The Commission has scheduled a sanctions hearing for mid-May on this issue. The Commission should not approve a spectrum management plan that has not been exposed to critical review. SWBT should not be allowed to use Section V(F) to anoint itself spectrum czar.

Fifth, section V(L) does not require SWBT to provide CLECs with mechanized and integrated Operating Support Systems access until SWBT's own retail operation have that kind of access. That condition should be removed. Integrated OSS is necessary for widespread DSL deployment. Furthermore, DSL services are not just competitive with one another; DSL services are a competitive alternative to SWBT's existing ISDN services. Indeed, one common form of DSL is IDSL, short for ISDN DSL. To compete with ISDN, CLECs offering DSL services need mechanized and integrated OSS. SWBT's 271 approval must be contingent upon completion of this OSS feature.

Sixth, section V(M) addresses parity with respect to provisioning and installation. Although the principle is sound, SWBT should acknowledge that providing CLECs with loops to be used for DSL services in the same interval in which SWBT completes installation of its competing retail service does not constitute parity. CLECs must complete a number of other steps beyond loop provisioning (e.g., line card installation, line testing, circuit provisioning, CPE configuration and installation) before their retail installation is complete. Consequently, SWBT must be required to install loops on a shorter time interval than it completes provisioning of its retail service. The CLECs urge the Commission to remember that DSL parity should be measured against SWBT's ISDN service. DSL competes directly with ISDN; DSL loops should be provisioned in the same time interval as ISDN loops.

VI. <u>OSS Commitments and MLT Testing</u>

A. OSS

The CLEC Coalition urges that while its members have not been the most vocal on OSS matters, there are OSS issues that are critical to the operations of a CLEC entering the business and considering or developing its OSS. These mission critical areas can be summarized as accurate documentation of existing or upcoming issuances, adherence to clear change management process guidelines, and finally, assurance that SWBT's commitments are not left as vague, open-ended promises without establishing the details and timeframes in which the community can reasonably expect and rely on SWBT's commitments. A brief review of a few of SWBT's identified commitments follows.

1. SWBT conformed its technical documentation to meet the development of its LEX and EDI interfaces through the December 19, 1998 EDI special release.

2. SWBT agrees to conduct monthly change management meetings with Commission Staff oversight at least through September 1999 and agrees to prepare and file minutes with the Commission within two weeks of each change management meetings [sic].

The members of the CLEC Coalition have not yet undertaken the development of an EDI system, but judging by the resources spent by the carriers who have and the results and roadblocks they have encountered, the decision to wait may have been more of a benefit than a detriment. Many of the issues discovered by AT&T and MCI that have been reported to SWBT to assist in SWBT's documentation have still not been memorialized in revisions to the technical documentation. AT&T's use of a third party in the testing project, provides evidence of this shortcoming in SWBT's documentation. As carriers who have not yet undertaken the gargantuan effort of developing their own EDI, the documentation is the very material that must be pristine. With the 12/19/98 Special Release referenced in SWBT's Commitments, SWBT neglected to follow its own change management procedures.

The Change Management Process is the process by which the industry is to work together to ensure that technical documentation is crisp and accurately captures technical requirements and planned releases. Because it is by this process that revisions are communicated, such matters handled outside of this process are likely to be invisible to those companies who are not involved in raising the issue. Further, action outside of this process would likely fail to provide sufficient programming time to accommodate the change. While many of the CLEC Coalition's membership have been relatively quiet on OSS matters, it is the ability to rely on the technical documentation as complete, comprehensive and accurate that is paramount. While these CLECs have not yet developed an electronic interface, it is likely that they will attempt to do so. Until SWBT follows through on its commitment to implement revisions to the programming code or to the documentation, and to utilize the change management process it has articulated, any attempt to develop such an interface would be unnecessarily expensive and time-consuming.

SWBT notes its agreement to conduct monthly change management meetings and to file minutes from those meetings within two weeks of each meeting. Despite a promising start (in terms of the regularly scheduled meetings), the process has fallen off its regular track. Research to review the minutes from the change management meeting held March 16th found only an Accessible Letter dated March 22nd stating that the April meeting had been cancelled and the March minutes would be filed the week of March 29th (within the two week period prescribed by the Commission). It was not until April 27th, *six* weeks after the meeting that the minutes were provided via Accessible Letter. Again, the minutes of these meetings may be more critical to the CLECs who are not involved in day to day discussions with SWBT but are continuing to plan their entry into the Texas market and making use of all available tools. Despite the Commission Staff's request, CLECs' communication of the importance of the change management information and the quality of SWBT's technical documentation, SWBT is either or unwilling or unable to follow through on its commitments in this regard.

7. SWBT has committed to implementation of electronic jeopardy noticiation coincident with industry guidelines and in accordance with the EDI change management process.

8. SWBT is implementing a mechanized interface between SHOTS and EDI/LEX, via LASR, to provide mechanical feeds for jeopardy situations.

11. SWBT has committed to implementation of EDI 9 and 10 for preordering, EDI 9 for preordering will be implemented in March of 1999; EDI 10 for preordering will be implemented via the change management process.
12. SWBT will make SORD available to CLECs by April 1, 1999.

While the CLEC Coalition welcomes SWBT's commitments to implement various OSS features and systems, promises without more substance make it unlikely that action can be relied upon. For example, SWBT notes that it is implementing a mechanized interface between SHOTS and EDI/LEX, via LASR, to provide mechanical feeds for jeopardy situations. SWBT fails to provide the details that make this commitment meaningful. What kind of input has SWBT sought on the interface? In what timeline does SWBT expect to complete development, test and deploy the interface? Which jeopardy situations will be covered by this interface, and are there any jeopardy situations that would not be covered by use of this interface?

SWBT further notes its commitment to implement EDI 9 in March of 1999. March of 1999 was a month ago, and it is not clear if the implementation was completed. SWBT's statement that EDI 10 for pre-ordering will be implemented via the change management process provides little solace to those CLECs who witnessed SWBT's failure to follow its own procedures in the issuance of the December 19th release. Likewise, SWBT states that it will make SORD available to CLECs by April 1, 1999. While SWBT will likely reply that no CLEC has requested access to SORD (although some may have), it is understandable that CLECs would not know to ask about it. None of the available resources to (including the customer handbook, the website, and the accessible letters) provide notice that SORD was made available. Despite SWBT's claims that SORD would require enhancements prior to CLEC use, and thus the availability date of April 1, 1999, it is not clear that those enhancements were necessary (given SWBT's CLEC operation's use of SORD prior to April) and it is likewise not clear that those enhancements were made. Certainly no training for SORD has been advertised to the CLEC community.

B. <u>MLT Testing</u>

SWBT agrees to provide access to MLT testing to allow CLECs to test their end users' lines for which SWBT combines UNEs, for CLECs that combine UNEs they obtain from SWBT, and for CLECs that resell SWBT services...

The ability to conduct MLT testing is necessary for both analyzing trouble and maintenance issues as well as for obtaining invaluable pre-order information. In this section of the MOU, SWBT makes no mention of their policy decision to prevent CLECs access to MLT capabilities in advance of the customer becoming a CLEC customer. Arguments regarding the confidential nature of such test results ring hollow given the mandated availability of customer service records ("CSRs") prior to obtaining a customer.

B. By March 31, 1999, SWBT will make MLT testing functionality available through its Toolbar Trouble Administration to allow CLECs to test their end user lines for CLEC's [sic] that combine POTS-like UNEs (analog line side port and 2-wire 8 db analog loop) purchased from SWBT.

SWBT's policy-based restriction is not supported by the FCC, the FTA or any technical restriction. Rather, despite the consistent directive to promote new and advanced services on a technology-neutral basis, SWBT continues to attempt to hobble companies that seek to provide services outside the realm of simple POTS-like services. By this restriction, SWBT appears to be attempting to prevent a legitimate use of information to which it has or could have access. It must be remembered that advancements in technologies and services should not be stifled simply because SWBT decides not to use the information in the execution of its business plan.

VII. Performance Measurements

In many ways, everything that has been done in the 271 process comes down to this: what type of performance is being provided to CLECs and what type of enforcement is available to compensate CLECs and the industry for substandard performance. Only the presence of performance standards and significant and certain penalties can guard against the reversal of the progress made in this forum. For competition to work and flourish, CLECs must be able to review reliable performance data, receive adequate compensation for poor performance, and rely upon SWBT to correct its poor performance. Without these safeguards, there is no incentive for SWBT to live up to its obligations under any Interconnection Agreement, whether negotiated, arbitrated or the product of this process.

As with the other areas discussed in this filing, the details on the implementation of this plan are missing. No one needs reminding that the details are what matter, and it is the details that need to be understood. Additional comments on the specific sections follow, but the members of the Coalition caution that Performance Measurement and Damage / Assessment Calculations require more review than that permitted in the day and a half available to parties.

Finally, performance measurements are being reviewed in Project 20000 by Telcordia. It is important to recognize, however, that Telcordia's review of the measurements will comprise more than just the evaluation / audit of identified measurements. All measurements will be reviewed to ensure that SWBT is collecting and reporting the data consistent with the business rules agreed upon in Project 16251. No reference to Project 20000 or the timeframes in the Master Test Plan should be considered as a limitation on Telcordia's activities.

A. 20 days prior to filing with the FCC for interLATA authority under Section 271, SWBT will provide 3 months of validated data where the sample size is 10 or greater for each reported measurement per CLEC per month, that is collected and reported on a disaggregated basis for all the performance measurements established by the Commission in Project No. 16251, with the exception of those performance measures established after 1-1-99 and those which require new systems or modifications of existing systems such as NXX and 911.

Given the statistical validity and availability of the permutation analysis, there is no reason to exempt the measurements for which the sample size is less than 10. Further, SWBT identifies two examples of measurement categories that will require new systems or modification of existing systems. This is an unnecessary and inappropriate exclusion. Measurements were developed in order to ensure that the proper performance is being provided. That no measurement existed prior to the end of 1998 or that SWBT has to modify a system to capture the data is no reason to excuse SWBT from the requirement to provide evidence that it is performing as required. At a minimum, SWBT must set forth with specificity the measurements for which it expects to be excused.

B. 90% of the validated Tier-2 performance measurement results where the sample size is 10 or greater for each reported measurement per month aggregated for all CLECs should demonstrate parity or compliance with the associated benchmark for two months of the relevant three-month period...

Tier 2 performance measurement results are not intended to compensate the injured CLEC, but rather are intended to deter poor, competition-affecting performance. Given the forgiveness built into each and every measurement (whether due to the level at which the benchmark was set, the k value, etc.), an additional range of forgiveness is unnecessary. This proposed 90% level when combined with allowing SWBT to demonstrate compliance in only two months instead of the required three consecutive months, dilutes the penalty's ability to deter poor performance. Moreover, two months of data simply is not a reliable indicator that SWBT is where it needs to be to be granted section 271 authority. If the Commission is convinced that SWBT is providing and is committed to continue providing services to CLECs in compliance with the reasonable performance measures developed here, it is difficult to understand why the requirement for consecutive three month performance compliance, that has been articulated frequently in this process has suddenly become an unattainable standard. SWBT has been on notice that three months of data would be required. Now it insists on something less. Once SWBT receives 271 authority, SWBT has no incentive to provide better performance, only worse despite the increased experience. The Coalition is concerned any retrenchment on performance measures and penalties will only lead to worsened future performance.

C. SWBT agrees to the Performance Remedy Plan established in the collaborative process which is attached as Schedules 1, 2, and 3.

Please see comments at the conclusion of Comments on Attachment B.

D. The Commission will resolve the following issues as noted:

1. The business rules for the Commisssion-approved performance measures will be completed by May 31, 1999.

While the CLEC Coalition does not anticipate devoting more time and resources to development of the business rules than the timeframe articulated by SWBT, it should be noted that *all* parties, including Staff, SWBT and the CLECs, have worked both diligently and tirelessly on an extremely aggressive schedule. The fact that the business rule document is not yet completed is evidence of size of the effort, and not the willingness, devotion or efficiency of the participants. With that background, members of the CLEC Coalition are committed to getting the measurements right and to that end, are committed to doing whatever it takes as quickly as possible. Establishing an artificial deadline, however, will not speed up the process.

3. Performance measurements for xDSL will be finalized within 30 days after the Arbitrators' award in Docket Nos. 20226and 20272 currently pending before the Commission.

This statement must be clarified to specify that additional measurements will be finalized in the listed timeframe, but in the interim the measurements that have been developed are available. During the six-month review period, if these measurements are found to be duplicative or inaccurately devised, they can be deleted, added to or modified.

E. It is the intention of the parties that no later than two years after SWBT or its affiliate receives Section 271 relief, the number of performance measures subject to damages and assessments should be reduced by at least 50%.

Again, the Coalition cannot understand why it would be necessary to reduce the number of measurements subject to penalties. SWBT's provision of poor, penalty-triggering performance should be the exception, not the rule. Especially to the extent that SWBT attempts to explain non-compliant performance by the "new" local environment, SWBT no longer has that excuse available. In two years, SWBT's operations should be running so smoothly that it owes no damages at all. If that is not the case, the state of Texas has much more to worry about than reducing the number of measurements subject to a penalty. If SWBT's operations are working well, such that the payment of damages or assessments are an acronym, adjusting which measurements are subject to damages or assessments as well as the amount and/or type of remedy are valid subjects of discussion for the 6 month review meetings.

F. SWBT will not be liable for the payment of either Tier 1 damages or Tier 2 assessments until the Commission approves the Proposed Interconnection Agreement between a CLEC and SWBT. Tier 2 assessments will only be paid on the aggregate performance for CLECs that are operating under the Proposed Interconnection Agreement.

The entirety of the PIA need not be approved prior to a CLEC MFNing into the provisions that provide the enforcement structure or the measurements. Rather, only the provisions into which a CLEC desires to MFN need be established. CLECs can understand the speed at which SWBT desires to move, and SWBT should be able to work in like fashion to implement the resolution of issues. Further, it should be clarified that Tier 2 assessments will be paid on the aggregate performance for CLECs that are operating under *the enforcement structure* provisions. Especially for those CLECs which have negotiated unique provisions apart from the entirety of the PIA. CLECs should not be held hostage to a generic agreement that no more suits their business plans than would any one CLEC's business plan suit SWBT. Any attempt to require adoption of the entirety of the PIA would effectively gut the ability of a CLEC to pick and choose among provisions.

H. In addition to the provisions set forth in the Performance Remedy Plan, SWBT shall not be obligated to pay liquidated damages or assessments for noncompliance with a performance measure if the Commission finds such noncompliance was the result of an act or omission by a CLEC. . . or unreasonably failing to timely provide forecasts to SWBT for services or facilities when such forecasts are required to reasonably provide such services or facilities... (partially recorded)

SWBT shall be excused from paying both liquidated damages and assessments only where the business rules provide for such exclusions based on forecasts.

A. Further, if the FCC rejects SWBT's 271 Application, or fails to approve SWBT's application by January 1, 2000, the commitments made in this Memorandum will be enforceable only for one year from the date the Commission approves the Proposed Interconnection Agreement.

B. Upon the FCC's approval of SWBT's 271 Application, the one-year term of the Proposed Interconnection Agreement will be automatically extended for an additional period of three years subject to the provisions of...

The application of the two preceding paragraphs is unclear. For example, assume that the PUCT approves the PIA on January 1 (used purely for ease of discussion). If the FCC receives the application and rejects the application, regardless of how long it takes for the FCC to reject the application, the agreement will only be enforceable through January 1 of the following year.

If the FCC approves the application on February 1, the three year extension provides that the agreement is enforceable through February 1, three years later. If the FCC rejects the application and then approves a subsequent application, it is not clear for what time frame applies to the PUCT approved PIA.

C. To the extent that any other party or entity challenges the lawfulness of any provision of this Memorandum and a court determines that one or more provisions are unlawful, thenthis Memorandum and any contractual and regulatory commitments made pursuant to this Memorandum are null and void.

The legality of such a provision is questionable, as it conditions the rights of contractual parties on the actions of other entities and, by its terms, purports to nullify the entire agreement between the parties as opposed to the offending section. Contracting on such large matters suggests that standard severability clauses and change in law provisions (as can be found in SWBT's current interconnection agreements) are appropriate to ensure that agreements formed between the parties are consistent with current law.

Schedule 1: Performance Remedy Plan

Qualifications to use Z test: Clarification

It is not clear how the Z statistic will be applied to benchmark measures. While some language indicates that for benchmark measurements the Z statistic is not used, other language indicates that the Z test is used but the denominator is one. ("For benchmark measures, substitute the benchmark value for the value calculated in the preceding sentences." p. 54 *but see* "For measurements where the applicable performance criterion is a benchmark rather than parity performance compliance will be determined by setting the denominator of the Z-test formula as one in calculating the Z-statistic." p.43). It is our understanding of benchmark measures that they include leeway such that application of a Z statistic is unnecessary. The appropriate comparison to a benchmark is the ILEC's actual performance.

Small Number of Data Points

As was mentioned earlier, given the statistical validity and availability of the permutation analysis for calculating performance for measurements with a small sample size, there is no reason to exempt the measurements for which the sample size is less than 10. Moreover, the statistically questionable alternative 1 (to apply the Z test to data samples under 30) subjects those measurements that typically only have a few data points, carriers entering a new type of service, and emerging carriers to an extra level of complication, effort and inefficiency. Given the availability of the software to conduct permutation analysis, using a statistically inferior method and requiring the CLEC to calculate performance in addition to SWBT's calculation with a different method potentially subjects understanding of the success of the performance for the measurement to uncertainty and an ambiguity about how to handle disputes about the success of the measure. The presence of this alternative serves to only complicate a structure that needs no additional complications. Thus, this alternative should be struck altogether, and affirmed that performance can be calculated on measurements with sample sizes from 1-29.

Changes to Existing Performance Measurements or Adoption of New Measurements:

As discussed above, the six month review meetings are an appropriate forum in which to discuss deletions, additions, or modifications to the existing performance measurements. Also appropriate for these meetings is discussion regarding a change in the damage or assessment amounts and classification. Changes should not be held hostage by the parties, and as a result, decisions on such changes should be by the Order of the Commission after industry review, and not dependent on agreement of the parties.

Exclusions Limited: Cap of Damage and Assessment Amounts

The Coalition urges the Commission to remove the damage and assessment cap for both Tier 1 and Tier 2 measurements. CLECs proposed a procedural trigger in the amount of $10 million per CLEC per month in lieu of a cap as a way to address concerns that the penalties would exceed reasonable bounds. The Coalition notes that SWBT's MOU that incorporates a much diluted procedural trigger (of $10 million for *all* CLECs per month) *as well as* caps on both Tier 1 and Tier 2 measures.

Under the procedural trigger system, if SWBT has legitimate reasons that support the excuse or reduction of amounts owed, Commission has the power to do so. If, however, the Commission finds that no reason exists, and that SWBT should be required to pay the amounts owed, there is no justification for limiting the remedy to the party(ies) whose damage was not likewise limited. Given that the Tier 1 measurements are designed to compensate CLECs for real harm they have suffered, it is inequitable to limit only the compensation but not the harm. Further, providing a cap for the deterrent-designed Tier 2 measurements eviscerates any deterrent available.

SWBT's MOU effectively provides that SWBT can provide the noncompliant performance it offered during one of the last months for which data exists, and because it would have reached its cap, SWBT would be in a position to force other companies out of business for damage to their reputations, financial losses, and general inability to serve customers as a result of SWBT's performance for the entire year. A review of the unvalidated data for recent months indicates that SWBT would consistently reach the penalty cap. Performance at the level of the penalty cap provides little confidence to would-be competitors.

Payment of Attorney's Fees

Given the enormous difference in size and resources of the participants (e.g. SWBT versus Westel), the prospect of a smaller carrier paying for its own attorney's fees in bringing a penalty amount for review to the Commission is daunting. The prospect of potentially being required to pay SWBT's attorney's fees (likely to be much higher than the fees that are often split among several) is likely to prevent CLECs from raising issues. The same most certainly could not be said for SWBT. Additionally, it is rare that the smaller CLECs have employees that are not actively involved in operating the company and a large sacrifice to spend the day showing the Commission how SWBT makes its days unproductive. The prospect of SWBT having the power and the incentive to not only incur costs that SWBT could much more easily support but also expect to lose time in the attempt to operate its business is a significant price. The members of the CLEC Coalition note that the provision requiring payment of another's attorney's fees can only hurt the smaller CLECs, and can only be viewed by SWBT as a cost of doing business.

Meaning of Disaggregation: Clarification p.48
For any performance measurement, each disaggregated category for which there are a minimum of 10 data points constitutes one "measure" for purposes of calculating K value.

The K values is to be determined by referencing the number of performance measurements that are being reported for the CLEC. It is important to clarify that the disaggregation referred to is a disaggregation among types of services (e.g. DS0, DS1, DS3 , or manual versus electronic, and not CLEC, all CLECs, and SWBT).

Per Occurrence v. Per Measurement / Cap

While the text of the proposal discusses Schedule 3's "Measurements that are subject to per occurrence damages or assessments with a cap," and a "per measurement" category, the table containing the liquidated damages table for Tier-1 measures states only that there is a "per occurrence" category and a "per measure/cap" category. It is unclear whether these titles have been flipped or they are as they were intended. See p.49

Application of Z Statistic: Clarification

When a CLEC is receiving fewer than 10 measurements, one can infer from the table that the k value would be zero. The table does not specify the critical Z value for less than 10 measurements. See p.51

Application of K Value Exclusions: Clarification

Determine the number and type of measures with a sample size greater than 10 that are "non-compliant" for the individual CLEC for the month... then sort according to number of data points in the low, medium, and high categories.

To arrive at the K value, one takes the number of all measurements, not the number of measurements that are non-compliant and not the number of measurements that have a sample size of greater than 10. Using the example on p.53,

> *(Application of the K value may be illustrated by an example, if the K value is 6, and there are 7 Low measures and 1 Medium and 1 High which exceed the critical Z-value, the 6 low measures with the lowest number of service orders used to develop the performance measure are not used to calculate liquidated damages, while the remaining Low measures and 2 Medium and High measures which exceed the critical Z-value are used.*

If the K value is 6, then there would be 1 low measure, 1 medium measure and 1 high measure after the application of the K value. Further, the last clause regarding the critical Z should include a statement to the effect that the "measures that exceed the critical Z where the measures are parity measures." p.53

General Assessments:

Assessments for Altering Data Reports:

SWBT should be responsible for an assessment penalized for altering data reports, in addition to assessments for missing and for incomplete reports. Without a corresponding assessment for altered reports, the structure incents SWBT to provide any information so long as it is timely, and to correct it only if the CLEC identifies it as incorrect. Then, once SWBT provides the correct information late, the CLEC no longer has a reason to dispute the alteration, and SWBT escapes an assessment for past due reports. Ultimately, under the current structure, SWBT has no incentive to make certain to include the correct data in the performance reports. This perverse incentive system creates a great burden on the resources of all involved. Moreover, SWBT should not have the ability to alter performance data previously submitted in the context of a dispute proceeding if it is not penalized for altering data. This is particularly true in the context of the "loser pays" provision.

Assessments for Late Payments:

The general assessments provisions provides that for each day after the due date SWBT fails to pay either the CLEC or the State Treasury, SWBT will incur additional assessents (i.e. interest to the CLEC and a fine in the amount of an additional $3000 per day to the State.) The CLEC Coalition strongly opposes a cap on Tier 1 and Tier 2 measurements but notes that under no circumstances should any payments owed for late payment to either the State or to the CLEC apply to the caps for damage and assessment amounts.

Wrap-Up on Performance Measurements:

After significant concessions were made in order to reach agreement, the remedy plan was apparently revised to greatly weaken Tier -1 performance measurements by a reduction of "high" damages to "low" damages for Resale POTS, Resale Specials, and UNEs including the LSC and LOC Grade of Service.

With the addition of additional forgiveness, damage and assessment cap amounts at such a low level, and the damage amounts at having been reduced for a large number of measurements, the enforcement plan is far less than it could be, and is likely insufficient to actually protect competition in Texas. The desire to push remedy amounts to a level everyone can be comfortable with is a result of viewing a remedy plan as a plan of obligations. It must be remembered that SWBT should never have to pay a single dollar under the plan provided SWBT offers performance that will allow a CLEC to compete in the marketplace in which SWBT has a monopoly. In fact, the members of the Coalition will tell you that they would be most happy to be paid nothing in liquidated damages so long as they were receiving compliant performance. It is a mistake to pull the teeth of the enforcement plan at the 11th hour after everyone spent months and months working to develop a plan that carefully balanced all the interests. Regrettably, this new proposed plan does not do that.

VIII. <u>Additional Agreement Terms</u>

C. In the event that a single provision of the MOU is determined to be unlawful, the entire Memorandum, as well as the contractual and regulatory commitments should not be declared null and void. As written, this provision totally undermines any certainty in the market. At best, only the provision that is found unlawful, and any contractual embodiments of the provision, should be declared null and void. Otherwise, every step the parties have made to establish the conditions for local competition will be wiped out in the event that a single provision of the MOU is declared unlawful. This provision is nothing more than an attempt to blackmail parties into not asserting their legal rights, a right that SWBT is clearly preserving for itself. It is unreasonable to allow SWBT to avoid its promises in their entirety, after it obtains § 271 relief, if anything is changed. The CLEC Coalition's reading of the MOU indicates that SWBT will still have the benefits of § 271 relief, but will immediately be relieved of the promises it made if the FCC or a court holds that the deal is inconsistent with the Act. This is completely inconsistent with §§ 251, 252 or 271, and it certainly cannot be in the public interest.

D. This provision is simply SWBT's section-by-section MFN policy restated. The requirement that CLECs take sections or portions that are "legitimately related"will be a mechanism for SWBT to force unwanted provisions upon CLECs. The Supreme Court has clearly affirmed CLECs' right to pick and choose provisions of other parties' interconnection agreements with SWBT.

SWBT has promised to file a "Proposed Interconnection Agreement" ("PIA") within 15 days of Commission action on the MOU. There are a number of questions, however, that must be addressed before the Commission can say "yes" without seeing and approving the actual agreement. We understand and appreciate that we will have an opportunity to provide comment on the PIA when it is filed. The following questions reflect our deep concern about how this process will work. 1. What status will the "Proposed Interconnection Agreement" have? Is it merely a Statement of Generally Available Terms as described by FTA 252(f)? If so, will it be processed and considered it as such? The description in the MOU implies that the Proposed Interconnection Agreement, however, will have a much different status, and will instead will a

"Super-Generic" from which SWBT will not budge absent an arbitration decision.[1] Each member of the CLEC Coalition has experienced SWBT's "good faith negotiation" which essentially comprises an offer of his or her generic or the right to exercise § 252(i) rights, as defined by SWBT. Any variation from pure total negotiation – of all issues, including settled matters such as ISP/reciprocal compensation or attempts to secure UNEs such as dark fiber or sub-loop unbundling – leads inexorably to arbitration or CLEC capitulation. Any CLEC attempting to MFN into an agreement and then negotiate changes in particular areas of specific concern related to a unique business plan[2] meets a wall of total resistance. The CLEC must either MFN into a single agreement or negotiate everything. Even after the Supreme Court decision affirming "pick and choose," SWBT has steadfastly insisted on no less than its on again, off again, "section by section MFN." The latest news is that SWBT insists that the General Terms and Conditions portion of an agreement is not subject to §252(i) and in any event is totally related. SWBT's refusal to implement § 252(i) as interpreted by the FCC's rules appears to be blessed, indeed, officially sanctioned, in the MOU. Will SWBT negotiate changes to the Proposed Interconnection Agreement without requiring a CLEC to re-litigate both the entirety of the mega-arbitration and the promises made this proceeding? If this is the case then the promises are empty indeed, because the price a CLEC will pay to actually obtain those terms is more than any single CLEC can afford.

The CLEC Coalition believes that a Statement of Generally Available Terms reflecting SWBT's promises could be in the public interest. But the document SWBT has promised to file must be treated as an SGAT, and handled as such. In addition, SWBT must be required to

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[1] As will be shown below, the Proposed Interconnection Agreement will require a CLEC to waive its § 252(i) rights as implemented by the FCC. As such, it cannot be a lawful Statement of Generally Available Terms.

[2] SWBT has completely refused, in individual negotiations, to honor the Commission decision in the *Waller Creek* case that a CLEC can MFN and then seek changes required by unique needs. SWBT will not negotiate changes if the CLEC starts with an existing agreement. SWBT will not materially diverge from its generic. Nothing in the MOU indicates that SWBT will change this approach. The Proposed Interconnection Agreement will merely supplant SWBT's generic, but it will have the added force of a Commission blessing in advance. We will further address this problem below.

expressly state that it will still negotiate individual terms with a CLEC that needs modifications to suit an individual business plan. The CLEC coalition is very concerned that the price of SWBT's entry in the toll market will be paid by the CLECs, and will in fact result in substantial erosion of the express terms of the Act and FCC rules. SWBT cannot be allowed to avoid the duty to negotiate in good faith, despite the existence of a Commission-approved SGAT. *See* FTA § 251(c)(1). SWBT has honored that section, for the most part, in the breach, and we question whether this promise will in fact "advance the ball" toward ending that situation.

2. Will SWBT use the Proposed Interconnection Agreement as a club, sword or shield?

SWBT is not a paragon of the virtue of willingness to deal. The CLEC Coalition members all wear the scars from SWBT's "good faith negotiation." While arms-length bargaining strengthened by enlightened self-interest is the foundation of the capitalist system, Congress imposed limits on SWBT because of the Company's continued extreme market power. A Statement of Generally Available Terms is appropriate. SWBT's use of an advance-approved, but yet-unfiled "Proposed Interconnection Agreement" is no less than an guarantee of more full-blown arbitratrions that will require re-litigation of both the mega-arbitration and this proceeding, however, is an.

Before the Commission says "yes" SWBT must be required to state that the as-yet-unseen, Proposed Interconnection Agreement will serve some function other than to further entrench SWBT's in its "good faith negotiation" under § 251(c)(1). This proposed agreement cannot be used as club, sword or shield to beat, slice or defend against legitimate requests for specific terms to meet legitimate individual CLEC business plans.

3. What rights will the participants to this case have to comment on the terms of the Proposed Interconnection Agreement? We understand that parties will be given an opportunity to comment on the PIA but need this confirmed by the Commission. Moreover, the PIA should be submitted and considered **before** the Commission says "yes" to SWBT's 271 application. The entire industry must be given the opportunity to comment on the proposed agreement, using

the procedures set out in § 252(f). The Commission must condition a "yes" on actual approval under § 252(f)(2), as opposed to allowing the SGAT to take effect under § 252(f)(2)(B).[3]

SWBT committed to file the Proposed Interconnection Agreement within 15 days of Commission "Approval." The CLEC Coalition can accept the 15-day filing by SWBT. But a final "yes" must await a final determination that the "Proposed Interconnection Agreement" actually comports with §§ 251, 252 and 271 of the Act and the FCC's rulings and regulations. As shown below, even though the available information is quite sketchy, the MOU reveals that the price for SWBT's entry into the toll markets is principally paid by the CLECs (in the form of waivers of express rights and rules under the Act of FCC regulations), and not SWBT.

4. Will the Proposed Interconnection Agreement be a liberating experience or, instead, a straightjacket?

The CLEC Coalition fears that the MOU, however well-intentioned, is an invitation to a "CLEC train wreck"; we cannot support a declaration that there is irreversible local competition based on this document. SWBT has developed a set of conditions that undercuts § 251, 252 and 271, rather than advancing competition. Unless SWBT unequivocally declares that the Proposed Interconnection Agreement is an option, and not a functional straightjacket then all of the efforts in the mega-arbitration and this proceeding will be a total waste, and subject to continued re-litigation. The primary problem is required waiver of the FCC's "pick and choose" rule recently affirmed by the U.S. Supreme Court. The CLEC Coalition has many questions and problems, but the biggest issue is the extent to which SWBT will be required to actually allow CLECs to exercise their § 252(i) rights as interpreted by the FCC.

Every CLEC coalition member wants to invest in Texas. Each member has done so because the Texas Commission has previously demonstrated a real commitment to real, sustainable competition in a number of major issues in previous cases. The MOU, however,

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[3] The MOU contemplates approval within 30 days, whereas § 252(f) grants 60 days for approval of an SGAT. The CLEC Coalition strongly believes the full period of time for review that is granted by the Act is essential, but is willing to accept a 45 day time line in the interest of compromise.

gives SWBT the power to eliminate most or those gains by functionally requiring every CLEC to opt in to an agreement that will not allow innovation, creativity or novel ideas. Certainly this is not the Commission's goal.

SWBT wants a single contract applicable to every CLEC. Without change, immutable. This was not, however, what Congress had in mind when it required individual contracts governed by certain basic principles. Congress did not want a bunch of little SWBTs, all subject to the same agreement, with no variation or change. The Commission has properly recognized the need to accommodate individual business plans in any number of individual arbitrations, and for good reason. The Proposed Interconnection Agreement, however, looks like it will assume the status of a tariff, with no possibility of change to suit individual CLEC needs. Section 271 was designed to supplement, not negate, §§ 251 and 251 and the FCC's rules. The MOU, however, appears to limit, rather than supplement, the rest of the Act. A straightjacket, precluding innovation, creativity and change. SWBT must state on the record that nothing in the MOU is intended to limit any rights granted under § 251 or 252 or PUC decisions in prior arbitrations; that the Proposed Interconnection Agreement is a liberating document, and not a straightjacket.

5. Do we lose pick and choose so that SWBT can crush us in the market place?

SWBT has very carefully constructed a scheme that requires CLECs wishing to accept the benefit of the mega-arbitration and this proceeding to waive pick and choose rights under § 252(i). The MOU requires any CLEC that wants to accept any UNE provision to take **all** the UNE provisions. While this limitation may be acceptable as an SGAT, it cannot serve as a preclusive document, subject to no change depending on individual CLEC business plans.

The most objectionable piece of the MOU is the required finding that the entire set of UNE provisions are "legitimately related" for purposes of § 252(i). A CLEC may have a reasonable need to diverge from the exact terms of the UNE in order to provide an innovative, advanced service. Any CLEC that wises to adopt portions of the UNE Attachment that are actually segregable from the rest will be precluded from doing so by this finding. SWBT seeks a finding that is not supported or supportable. The Commission should not make this finding until it actually sees the "Proposed Interconnection Agreement." SWBT is requiring the PUC to agree that its "section by section MFN" approach properly implements the FCC's reinstated pick and choose rule, when the Commission has not received any briefs on this most important subject.

A critical part of any interconnection agreement is the part dealing with UNEs. The participants have litigated any number of cases, including this one, in an attempt to secure reasonable access to UNEs. SWBT is now trying to put the entire matter to rest in one single, immutable package that is invulnerable to change. This is a clear violation of § 252(i) and the FCC's rules.

5. What happens if the PUC requires changes to SWBT's Proposed Interconnection Agreement?

SWBT has cast the MOU as if it is set in stone. For example, what if the Commission does not approve SWBT's Proposed Interconnection Agreement? Does a rejection of a single term in SWBT's Proposed Interconnection Agreement mean that the entire deal is undone? How can the Commission approve § 272 relief based on the filing of an as-yet-unseen and certainly not approved document when SWBT will not even expressly agree that changes are allowed? *See* Attachment B, ¶ VIII.A.

6. What happens if the FCC approves SWBT's application, but with conditions, or a court holds the promises do not meet the requirements of the Act?

SWBT has conditioned all of its commitments on approval, by both the PUC and FCC, of the promises SWBT makes. Do the promises hold if the PUC or FCC change a jot or a tittle? We do not know, but the document itself implies that this is a package deal, subject to absolutely no change. Even if a court holds that a particular portion is illegal. *See* Attachment B, VI.C.

The CLEC Coalition's preliminary review indicates that the MOU is more of a trap for the unwary than a genuine roadmap for true competition. A straightjacket and not a recipe for innovation or customer choice. SWBT has drafted a document that limits rights granted under §§ 251 and 252, but gives SWBT incredible freedom to dominate both the local and long distance markets. We cannot support the MOU until our questions are answered and the process is complete.

The Proposed Interconnection Agreement is the cornerstone of the deal, and more of a millstone for the entire industry. The CLEC Coalition respectfully requests that SWBT at least be required to actually submit this document for review and approval prior to any "yes" on in-region interLATA authority. The MFN concerns alone justify this action.

Conclusion

In summary, while the Coalition appreciates the spirit of the MOU, many critical details remain to be seen before the Commission should say "yes" to SWBT. At a minimum, the Commission and parties should be given a reasonable time to review and comment on the Proposed Interconnection Agreement and CLECs ability to MFN into portions of the agreement. In addition, the questions and requests for clarification posed herein should be addressed by the Commission and SWBT.

Respectfully submitted,

CASEY, GENTZ & SIFUENTES, L.L.P.
919 Congress Ave., Suite 1060
Austin, Texas 78701
512/480-9900
512/480-9200 FAX

By: ______________________________
Robin A. Casey
State Bar No. 03960300
Rina Hartline
State Bar No. 00797724

ATTORNEYS FOR TIME WARNER
TELECOM OF TEXAS, L.P., INTERMEDIA
COMMUNICATIONS, INC., NEXTLINK

TEXAS,

INC., COVAD COMMUNICATIONS COMPANY
WESTEL, INC. AND ICG COMMUNICATIONS,
INC.

W. Scott McCollough
State Bar No. 13434100
McCOLLOUGH & ASSOCIATES, P.C.
1801 North Lamar, Ste. 104
Austin, Texas 78701
512/485-7920
512/485-7921 FAX

ATTORNEYS FOR e.spire COMMUNICATIONS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response of the CLEC Coalition to Southwestern Bell Telephone Company's Memorandum of Understanding has been served on all parties of record via facsimile, hand delivery, or overnight delivery service on this 28th day of April, 1999.

Robin A. Casey

Exhibit 1

BRIEFING PAPER ON FCC RULES GOVERNING USE OF UNBUNDLED NETWORK ELEMENTS

I. The Use of Enhanced Extended Links or Other Non-Switching UNEs Cannot Be Restricted

1. The Only Limitation on UNE Use Is Restricted to Unbundled Local Switching

In its *Local Competition Reconsideration Order*, the FCC addressed whether an IXC could use an unbundled local switching UNE solely to terminate its long distance traffic. The FCC found that such an arrangement would not be practical, because the local switch port is needed to provide both local and interexchange service, and that use of that switch port to provide only long distance service would mean that the customer could not receive local calling service. The FCC found that:

> We thus make clear that, as a practical matter, a carrier that purchases an unbundled switching element will not be able to provide solely interexchange service or solely access service to an interexchange carrier. A requesting carrier that purchases an unbundled local switching element for an end user may not use that switching element to provide interexchange service to end users for whom that requesting carrier does not also provide local exchange service.[4]

2. Interconnection Is Available to CLECs for the Provision of Local and/or Long Distance Services and UNEs are a Form of Interconnection

In its Local Competition Order, the FCC expressly found that ILECs could not impose a "local service requirement" upon CLECs seeking interconnection. The FCC stated:

> We conclude that the phrase "telephone exchange service and exchange access" imposes at least three obligations on incumbent LECs: an incumbent must provide interconnection for purposes of transmitting and routing telephone exchange traffic or exchange access traffic or both. . . . Congress made clear that incumbent LECs must provide interconnection to carriers that seek to offer

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[4] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 13042, ¶ 13 (1996) (*Local Competition Reconsideration Order*).

telephone exchange service *and* to carriers tot seek to offer exchange access.[5]

* * * * *

We also conclude that requiring new entrants to make available both local exchange service and exchange access as a prerequisite to obtaining interconnection to the incumbent LEC's network under subsection (c)(2) would unduly restrict potential competitors. For example, CAPs often enter the telecommunications market as exchange access providers prior to offering telephone exchange services. . . . We see no convincing justification for treating providers of exchange access services that offer telephone exchange services differently from access providers who do not offer telephone exchange services. We therefor conclude that parties offering only exchange access are permitted to seek interconnection pursuant to section 251(c)(2).[6]

3. UNEs Are Available to CLECs for the Provision of Local and/or Long Distance Services

- "The only limitation that the statute imposes on the definition of a network element is that it must be 'used in the provision of a telecommunications service.'"[7]

- "We further conclude that 'access' to an unbundled network element refers to the means by which requesting carriers obtain an element's functionality in order to provide a telecommunications service."[8]

4. Neither the Federal Communications Act Nor the FCC's Rules Permit Any Restrictions on a CLEC's Ability to Use UNEs to Provide Data Services

Any restriction that would prevent a CLEC from using EELs, other UNEs (with the exception of unbundled switching, as discussed above), or other combinations of UNEs unless they provide local dialtone would effectively prevent CLECs from using such UNEs to provide the most important data-oriented services that are now becoming available. These services

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5 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Memorandum Opinion and Order, 11 FCC Rcd 15499, ¶ 184 (1996) (*Local Competition Order*) (*emphasis in original*).

6 *Id.* at ¶ 185.

7 *Id.* at ¶ 261 (citations omitted).

8 *Id.* at ¶ 269.

include Digital Subscriber Line-based broadband services (including video teleconferencing and high capacity Internet access), voice over Internet Protocol, Frame Relay data services, and other state-of-the-art telecommunications services. As discussed below, the Federal Communications Act and controlling FCC decisions prohibit such restrictions.

A. The Federal Communications Act

- § 153(26) defines "local exchange carrier" as "any person that is engaged in the provision of telephone exchange service *or* exchange access" (*emphasis added*).

- § 153(47) defines "telephone exchange service" as "(A) service within a telephone exchange or within a connected system of telephone exchanges within a connected system of telephone exchanges, within the same exchange are operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."

- § 153(16) defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."

- § 153(46) defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used*" (*emphasis added*).

B. The FCC's Rules

- 47 C.F.R. § 51.309(a) states that "[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of , unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in a manner that the requesting telecommunications carrier intends."

C. The FCC's Initial 706 Order

In its 706 Order, the FCC expressly found that broadband services – including ADSL-based internet access – are either exchange service or exchange access service, as defined by the Federal Communications Act.[9] In so doing, the FCC expressly found that ILECs were obligated under § 251(c) of the Act to make available UNEs for the provision of such services.[10] In light of these express findings, ILEC arguments that EELs or other UNEs can be withheld from carriers that provide solely data services must be rejected.

This conclusion is also required by simple common sense. There are many CLEC business plans that focus on the provisioning of data services to customers that do not require traditional voice services. These include:

- Frame Relay services used to connect Local Area Networks or Intranets. These are data applications used over lines that are separate and distinct from those used by the customer for its voice telephony.

- High capacity Internet access. The new "Data CLECs" seek to provide this service to customers that obtain their voice telephone service from ILECs or other carriers.

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9 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 98-188, Memorandum Opinion and Order and Notice of Proposed Rulemaking at ¶ 40 (1998) (*706 Order*).

10 *Id.* at ¶¶ 32, 52-53, 57-58.

- Internet Access and Internet Protocol Telephony. The FCC has recently issued orders finding that dedicated ADSL-based lines that carry traffic to Internet Service Providers ("ISPs")[11] and dial-up connections to ISPs[12] are both jurisdictionally interstate. A restriction that CLECs may only use EELs or other UNEs to provide local exchange service would prevent CLECs from providing these and other critically important new services.

D. The FCC's Recent 706 Collocation Order

On March 18, 1999, the FCC adopted an order that establishes national standards for collocation, and initiating a new proceeding to establish rules involving the provision of unbundled loops and other UNEs to CLECs for the purposes of providing data services, including "line sharing".[13] Line sharing involves the use of a single unbundled local loop by two carriers – one which provides data services, while the other provides voice services. The FCC tentatively concluded that such line sharing is technically feasible, and solicits comments on the rules it should adopt to implement such sharing. While the FCC's ruling that line sharing is technically feasible is only a tentative conclusion, it necessarily implies that CLECs have the right to use an unbundled loop to provide only data service, apart from voice service.

II. Access Charges Do Not Apply When Telecom Carriers Use UNEs to Provide Competitive Service

1. The FCC Has Expressly Found that CLECs Using UNEs to Compete Against ILEC Access Services Do Not Pay Access Charges

In the *Local Competition Order*, the FCC specifically rejected ILEC arguments that CLECs purchasing UNEs must continue to pay access charges:

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11 *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, CC Docket No. 98-79 (released October 30, 1998).

12 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Declaratory Ruling, Docket No. 96-98 (released February 25, 1999).

13 FCC News Release, "FCC Adopts Rules to Promote the Deployment of Advanced Telecommunications Services (CC Docket No. 98-147)," released March 18, 1999.

> We reject the argument advanced by a number of incumbent LECs that section 251(i) demonstrates that requesting carriers using unbundled elements must continue to pay access charges. . . . When interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access "services." They are purchasing a different product, and that product is the right to exclusive access or use of an entire elements.[14]
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> * * * * *
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> We affirm our tentative conclusion in the NPRM that, telecommunications carriers purchasing unbundled network elements to provide interexchange services or exchange access services are not required to pay federal or state exchange access charges except as described in section VII, *infra*, for a temporary period.[15]

The temporary exception discussed in this last statement refers to two per-minute federal access charges – the Carrier Common Line Charge and the Transport Interconnection Charge – that competitive carriers had to pay on a temporary basis. Importantly, these charges only applied to carriers that purchased unbundled switching UNEs.[16] Moreover, this was a temporary, interim measure that expired in 1997.[17] Under the FCC's rules, access charges never applied to carriers purchasing UNEs other than unbundled switching.

2. The FCC's Pricing Rules Exclude Subsidies Embedded in Access Charges

Section 252 of the FCA sets pricing standards for Interconnection and Unbundled Network Elements (as well as resale and reciprocal compensation). The FCC found that the "based on cost" standard of § 252(d)(1), which applies to both Interconnection and UNEs, requires the application of a Total Element Long-Run Incremental Cost ("TELRIC") cost model.[18] The FCC's ability to set this costing methodology as a standard that must be adopted by State regulatory bodies was recently affirmed by the Supreme Court.[19] In defining its TELRIC

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14 *Local Competition Order* at ¶ 358.

15 *Id.* at ¶ 363.

16 *Id.* at ¶ 721.

17 *Id.* at ¶ 720.

18 *E.g., Local Competition Order* at ¶ 699.

19 *AT&T Corp. v. Iowa Utilities Bd.*, ___ U.S. ___, 1999 WL 24569 (Jan. 25, 1999).

standards, the FCC expressly *excluded* Universal Service Subsidies from the rates that ILECs could charge for both Interconnection and UNEs:

> We conclude that funding for any universal service mechanisms adopted in the universal service proceeding may not be included in the rates for interconnection, network elements, and access to network elements that are arbitrated by the states under sections 251 and 252. Section s 254(d) and 254(e) of the 1996 Act mandate that universal service support be recovered in an equitable and nondiscriminatory manner from all providers of telecommunications services. We conclude that permitting states to include such costs in rates arbitrated under sections 251 and 252 would violate that requirement by requiring carriers to pay specified portions of such costs solely because they are purchasing services and elements under section 251. Section 252(d)(1) requires that rates for interconnection, network elements and access to network elements reflect the costs of providing those network elements, not the costs of supporting universal service.[20]
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> * * * * *
>
> If a state collects universal service funding in rates for elements and services pursuant to sections 251 and 252, it will be imposing non-cost based charges in those rates. Including non-cost based charges in the rates for interconnection and unbundled elements is inconsistent with our rules implementing sections 251 and 252 which require that these rates be cost-based. . . . States may not, therefore, include universal service support funding in the rates for elements and services pursuant to section s 251 and 252, nor may they implement mechanisms that have the same effect.[21]

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20 *Local Competition Order* at ¶ 712 (citations omitted).

21 *Id.* at ¶ 713.